RECORD
AND
BRIEF

No. 15-827

IN THE

Supreme Court of the United States

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F.,

Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The petition shows that the circuits are in disarray concerning an important question of federal law: what level of educational benefit school districts must confer on children with disabilities to provide them with a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA). Respondent offers three reasons why this Court should deny review: (1) the conflict is not as stark as the petition maintains; (2) resolving the conflict will not make a difference in determining whether school districts have provided a FAPE to children with disabilities; and (3) this Court resolved the merits almost thirty-five years ago in *Board of Education v. Rowley*, 458 U.S. 176 (1982).

None of these reasons is persuasive. This Court should grant review.

A. The Circuits Are In Disarray.

1. The petition explains that the circuits are intractably divided over what the IDEA means when it requires school districts to provide an "appropriate" level of education to children with disabilities. Two circuits – the Sixth and the Third – hold that a child's individualized education program (IEP) must be calculated to provide the child with a substantial educational benefit. Pet. 10-11. Five other circuits expressly reject that view and hold that this Court's decision in *Rowley* requires no more than a just-above-trivial educational benefit. *Id.* at 11-13. Three circuits also appear to apply the just-above-trivial standard but without expressly rejecting the higher standard. *Id.* at 13-14. And the Ninth Circuit is

internally conflicted, with different panels aligning with opposite sides of the circuit split. *Id.* at 14.

Respondent's primary response to this deep division among the courts of appeals is that some circuits that apply the just-above-trivial standard use different adjectives (generally, "some" and "meaningful") to describe the level of educational benefit that they think the IDEA requires. BIO 12-20. This argument is a non sequitur. As the petition acknowledges (at 17), some circuits in that camp have indeed used the term "meaningful benefit," and others have used "some benefit," *see id.* at 11-12, 13-14. But respondent does not disagree that all of these circuits, in fact, have adopted a just-above-trivial standard.[1]

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[1] Consistent with the petition (at 12-13), respondent's discussion of the case law acknowledges that the First, Second, Fourth, and Tenth circuits require no more than a just-above-trivial benefit. *See* BIO 17 (quoting *D.B. v. Esposito*, 675 F.3d 26, 34-35 (1st Cir. 2012) ("more than a trivial educational benefit")), 19 (quoting *P. ex rel. Mr. and Mrs. P. v. Newington Bd. of Educ.*, 546 F.3d 111, 119 (2d Cir. 2008) ("more than only 'trivial advancement'")), 20 n.18 (quoting *O.S. v. Fairfax Cnty. Sch. Bd.*, 804 F.3d 354, 359 (4th Cir. 2015) ("more than minimal progress")), 19 (quoting Pet. App. 16a ("must merely be 'more than *de minimis*'") (Tenth Circuit's decision below)). Nor does respondent deny that the Fifth, Seventh, Eighth, and Eleventh circuits also apply a just-above-trivial standard. *See* Pet.13-14; *see also* BIO 20 (quoting *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 248 (5th Cir. 1997), and *Alex R. v. Forrestville Valley Cmty. Unit Sch. Dist.*, 375 F.3d 603, 615 (7th Cir. 2004), for the proposition that the IDEA requires that an IEP "likely . . . produce progress, not regression or trivial educational advancement.").

Nor does respondent disagree that panels in the Ninth Circuit have come to very different conclusions, with one panel adopting the heightened standard enunciated by the Third and Sixth Circuits, then another adopting a lower standard, and, most recently, still another "reviving" the higher standard on the ground that the IDEA's 1997 amendments demand it. BIO 23-25 & n.22; *see* Pet. 14 (explaining Ninth Circuit case law).

2. That leaves the Third and Sixth Circuits, which, as noted, require that school districts seek to provide children with disabilities a substantial educational benefit. *See* Pet. 10-11. Respondent does not deny that these two circuits have taken a different, more demanding approach. Instead, respondent suggests only that the Third and Sixth Circuits may not be genuinely committed to the higher standard. This suggestion is incorrect.

Third Circuit. Respondent acknowledges that the Third Circuit adopted a higher standard, BIO 21, but then claims that the Third Circuit "has not strayed far, or for long" from other circuits, *id.* at 22. That claim is wrong. The Third Circuit has consistently applied a higher standard, and rejected the just-above-trivial standard, beginning almost thirty years ago. *See, e.g., Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 178-85 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989). That court squarely reiterated its view in *Ridgewood Board of Education v. N.E. ex rel. M.E.*, 172 F.3d 238, 247 (3d Cir. 1999). *See also T.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 577 & n.2 (3d Cir. 2000) (Alito, J.) (embracing the *Polk* standard and explaining that

the district court erred as a matter of law in using the just-above-trivial standard).

Contrary to respondent's suggestion, the Third Circuit has not in recent years abandoned or softened its support for the higher standard, and respondent points to no Third Circuit decision that does so. Rather, the Third Circuit continues to emphatically embrace the higher standard and reject the just-above-trivial standard. *See L.E. v. Ramsey Bd. of Educ.*, 435 F.3d 384, 390 (3d Cir. 2006). And, even as respondent notes that various commentators differ over the exact configuration of the multi-circuit conflict, BIO 15-16 & nn.12-13 – hardly a way to demonstrate a lack of division among the circuits – it expressly acknowledges that all of these commentators place the Third Circuit on the heightened-benefit side of the divide. *See id.* at 16 & n.12.

Sixth Circuit. Respondent's attempt to explain away the Sixth Circuit's position is even weaker. Respondent does not deny that the Sixth Circuit has expressly rejected the just-above-trivial standard and adopted a higher standard – and followed the Third Circuit's precedents in doing so. *See Deal v. Hamilton Cty. Bd. of Educ.*, 392 F.3d 840, 862-63 (6th Cir. 2004), *cert. denied*, 546 U.S. 936 (2005). Rather, respondent simply chastises the Sixth Circuit's analysis on its merits, claiming that *Deal*'s adoption of the higher standard was borne out of misunderstandings of this Court's decision in *Rowley* and the IDEA's legislative history. BIO 22-23. This argument, however, underscores, not mitigates, the need for review.

Respondent also claims that "the passage of time has worn the edges off of *Deal*," BIO 23, but it cites no Sixth Circuit decision even suggesting that that court has backed away from *Deal* – and there is none. Respondent says only that the 2006 decision in *Deal* has not been viewed as significant in other circuits, *see id.*, although even on that score respondent acknowledges *Deal*'s substantial impact on the confused state of affairs in the Ninth Circuit. *See id.* at 24 (citing *N.B. v. Hellgate Elementary Sch. Dist. ex rel. Bd. of Dirs.*, 541 F.3d 1202, 1213 (9th Cir. 2008)). In any case, *Deal*'s impact (or not) outside of the Sixth Circuit does not negate its secure position on one side of the circuit conflict.

* * *

One final point – ignored by respondent – underscores the existence, and persistence, of the circuit split. Five circuits have acknowledged, but rejected, the higher standard embraced by the Third and Sixth Circuits. *See* Pet. 12-13 (discussing the precedent in these five circuits). The Tenth Circuit below, for instance, adopted the "more than de minimis" standard, Pet. App. 16a-17a (citation omitted), and "explicitly rejected" the "Third Circuit's heightened 'meaningful benefit' standard." *Id.* at 19a; *see also, e.g.*, *Todd v. Duneland Sch. Corp.*, 299 F.3d 899, 905 n.3 (7th Cir. 2002) (expressly rejecting the "more stringent test" prevailing in the Third and Sixth Circuits).

This Court should resolve the acknowledged and longstanding conflict.

B. The Question Presented Is Important And Outcome Determinative.

Respondent argues that the question presented is unimportant because the varying standards in the circuits – and presumably any standard that this Court might adopt in interpreting the IDEA – would make little or no difference in the actual educational benefits received by students with disabilities. Before explaining why that argument is wrong, it is important to emphasize what respondent is *not* arguing and, thus, what it is tacitly conceding.

First, respondent does not dispute that if rejecting the just-above-trivial standard *could* affect outcomes in some cases, it would almost surely matter to Drew, because, as the Tenth Circuit recognized, his is "without question a close case." Pet. App. 23a. Second, respondent does not contest that this case – with its fully developed record and extended legal analysis below – is an excellent vehicle for resolving the question presented. *See* Pet. 19.

Instead, respondent appears to argue that review should be denied because, in its view, the question presented is not *generally* outcome determinative – that is, that the substantive standard for providing a FAPE, whatever it may be, almost never makes a difference in determining whether a child with a disability has received a FAPE. *See* BIO 10 (argument heading), 12-20, 27. Respondent claims that disputes over the appropriate standard are purely semantic – that, under the IDEA, standards such as "meaningful benefit," "some benefit," and "just above trivial" are generally unimportant, *id.* at 15-17, 19 – and that it is the facts of a given case, not

the FAPE standard, that matter, *id.* at 27. *See also id.* at 12 (the circuit conflicts are about "adjectives, not outcomes").

Respondent is incorrect. For starters, both petitioner and amici have demonstrated that the application of different FAPE standards do, in fact, alter the outcome in a range of IDEA cases. Pet. 17-18; Am. Br. of Autism Speaks, et al. 9-15 (describing the FAPE standards' "dramatic consequences" on case outcomes) (quoting heading). Respondent has not even attempted to dispute this showing. Nor has respondent answered the thousands of school boards, school administrators, and school attorneys who told this Court a decade ago that they needed an answer to the question presented because it would provide them "a uniform federal standard for determining whether states and school districts have met their obligations under the Act." Amicus Brief for Nat'l Sch. Bds. Ass'n et al., *Deal v. Hamilton Cty. Dep't. of Educ.* (No. 05-55), 2005 WL 2176860, at *1 (2005); *see also id.* at *11 (explaining that the FAPE standard "can make a concrete difference" in case outcomes).

More fundamentally, respondent's position defies common sense. That courts sometimes use different terms interchangeably or imprecisely is no reason to suggest, as does respondent, that "different adjectives" are never legally significant. BIO 12. "Probable" cause and "reasonable" suspicion may defy precise definition, or perfect implementation, but after judicial clarification and on-the-ground application, we know that the former demands significantly more than the latter. So, too, for instance, with varying formulations for standards of review or burdens of proof, which, this Court has

made clear, influence outcomes. *See, e.g., Pierce v. Underwood*, 487 U.S. 552, 565–68 (1998); *Santosky v. Kramer*, 455 U.S. 745, 758-66 (1982). And that some of the courts of appeals may unwittingly use "some benefit" and "meaningful benefit" to connote the same standard in construing the IDEA, *see* Pet. 17, is not a reason to deny review, but a reason to grant it, and to explain with clarity the standard that school districts must meet in seeking to provide students with a FAPE. Indeed, respondent's argument that state legislatures are the proper bodies "to impose a higher standard," BIO 27 (argument heading) – though misplaced because it is this Court's job to determine what the IDEA means – is an unstated concession that differing FAPE standards can matter to school districts, parents, and children with disabilities.

Finally, respondent claims that review should be denied because "[b]orderline cases will exist for as long as there are borders," and so "[c]hanging a border will not eliminate borderline cases." BIO 27. True, but irrelevant. The question presented is not about whether close cases exist or how to resolve them. The issue here concerns what the border is in the first place.

C. Respondent's Defense On The Merits Provides No Basis For Denying Review.

The petition maintains that the IDEA requires that an IEP be calculated to provide children with disabilities a substantial educational benefit and explains why the just-above-trivial standard embraced by the Tenth Circuit is at odds with the Act. Pet. 21-26. In general, respondent does not address these arguments, and so we will not rehash them here.

Respondent rest its merits defense on the simple conclusion that this Court resolved the question presented nearly thirty-five years ago in *Board of Education v. Rowley*, 458 U.S. 176 (1982). Respondent says that *Rowley* is now "settled law," BIO 10, which requires school districts to provide children with disabilities only minimal educational benefits, *id.* at 19. As discussed in the petition (at 4-5, 24-25), that understanding of *Rowley* is incorrect.

Rowley held only that children with disabilities are entitled to substantive legal protection and left open the question of what level of benefit is appropriate. It did not attempt "to establish any one test for determining the adequacy of educational benefits," 458 U.S. at 202, and "confine[d its] analysis to th[e] situation" before it, in which a child, who sought provision of a personal special-education assistant, was already "performing above average in the regular classrooms." *Id.* Thus, "[n]othing in *Rowley* precludes" a FAPE standard that exceeds the just-above-trivial standard adopted in some circuits. *Deal v. Hamilton Cty. Bd. of Educ.*, 392 F.3d 840, 863 (6th Cir. 2004), *cert. denied*, 546 U.S. 936 (2005).

In any event, for present purposes, respondent's singular focus on *Rowley* puts the cart before the horse. In light of the differing FAPE standards in the circuits, *Rowley*'s meaning, assuming it is ultimately relevant, must be viewed as an open question that can be resolved only by this Court. Put another way, if this Court grants review, there will be time enough to debate the merits, including whether an issue that currently divides the lower courts was really decided by the Court decades ago.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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